For reasons given we dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.; Chye, Chow, Chung & Co.; Skrine & Co.*

ANG KOON KAU & ANOR. v. LAU PIANG NGONG

[F.C. (Wan Suleiman, Seah & Mohamed Azmi F.JJ.) March 6 & June 23, 1984]

[Johore Bahru – Federal Court Civil Appeal No. 279 of 1983]

Tort – Negligence – Pleadings – Pleadings imprecise – Evidence in Court not supporting allegation in pleadings – Defendant not taken by surprise – Particulars of negligence proved.

Practice and Procedure – Pleadings – Imprecise pleadings.

In this case the respondent was travelling on a motor cycle following a motor lorry-cum-trailer driven by the first appellant. At a bend the lorry-cum-trailer was involved in an accident with an on-coming lorry. The respondent sustained injuries from the accident and made a police report in which he said that he was behind the lorry-cum-trailer when the trailer came off and then collided with the motor lorry coming from the opposite direction. He then stopped his motorcycle and went to the side of the road but the on-coming lorry which had collided with the trailer hit him and oil-palm fruits from the lorry fell over him. In his statement of claim the respondent had alleged that the trailer of the lorry had become disconnected and then collided with his motorcycle and the other lorry. In other words he claimed that it was the trailer and not the other lorry which had collided with him. In his evidence in chief the respondent confirmed the account given in his police report. In particular he repeated that the trailer had snapped off before the collision between the tractor and the on-coming lorry. The learned judge found in favour of the respondent. The appellants appealed. The main question was whether since the statement of claim alleged that it was the trailer which collided with the plaintiff's (respondent's) motorcycle and since no evidence was given in court to support this allegation, the plaintiff/respondent could succeed in the claim.

Held, dismissing the appeal: the legal result which the plaintiff/respondent was seeking to show from the facts pleaded was that the first defendant/appellant had failed in his duty of care to the plaintiff/respondent, resulting in the injuries and damage suffered by him. The learned trial judge found on the evidence adduced that all the particulars of negligence alleged against the 1st appellant with regard to the trailer was on the balance of probabilities proved. Since he found that the defence had advanced no explanation whatsoever as to why or how the collision had come about, he rightly gave judgment for the plaintiff/respondent.

Cases referred to:–

(1) *Anjalai Ammal & Anor.* v. *Abdul Kareem* [1969] 1 M.L.J. 22.
(2) *Esso Petroleum Co Ltd* v. *Southport Corporation* [1956] 2 W.L.R. 81.
(3) *Menah binti Sulong* v. *Lim Soo & Anor.* [1983] 1 C.L.J.. 26.
(4) *Siti Aishah binti Ibrahim* v. *Goh Cheng Hwai* [1982] 2 M.L.J. 124.
(5) *K.E.P Mohamad Ali* v. *K.E.P Mohamad Ismail* [1981] 2 M.L.J. 10.
(6) *O.C.B.C. Limited* v. *Philip Wee Kee Puan* [1984] 2 M.L.J. 1.
(7) *Playing Cards (Malaysia) Sdn Bhd* v. *China Mutual Navigation Co. Ltd.* [1980] 2 M.L.J. 182.
(8) *Waghorn* v. *George Wimpey & Co. Ltd.* [1969] 1 W.L.R. 1764.
(9) *John G. Stein & Co Ltd* v. *O'Hanlon* [1965] A.C. 890, 909.

FEDERAL COURT.

Dulip Singh for the appellants.
Subra Naicker for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the Judgment of the Court): The plaintiff Lau Piang Ngong was on his way to Batu Pahat travelling on a motor cycle. At the 25th milestone Johore Bahru/Ayer Hitam road he followed a motor lorry-cum-trailer No. JM 4870 driven by the defendant Ang Koon Kau. At a bend Ang's lorry-cum-trailer was involved in an accident with an on-coming motor lorry JJ 1058, the driver of which was killed in the accident. In the Statement of Agreed Facts it appeared that the road surface was dry, the weather condition was fine and visibility was good.

A few hours after the accident Ang lodged a police report in which he said that at the time of the accident his trailer detached itself from the lorry. He then stopped and saw his trailer some 400 yards behind. On looking closer he found blood on the left side of the road and also discovered that his trailer was damaged. He gave no explanation in the report as to how the trailer had become detached.

Lau sustained serious injuries from that accident and made a police report just over two months thereafter. In it he said that at the scene

of the accident he was about 50 feet behind Ang's lorry when the trailer came off and then collided with the motor lorry coming from the opposite direction. He then stopped his motor cycle and went to the side of the road but the oncoming lorry which had already collided with the trailer hit him and oil palm fruits from the lorry fell over him.

On November 26, 1979 a Statement of Claim was filed by his solicitors. In view of the issues raised in this appeal paragraphs 3,4 and 5 therein are set out in full hereunder:–

"3. On the 13th of June 1977 at about 4 p.m. the plaintiff the rider of m/cycle No. JQ 6792 was travelling from the direction of Kulai towards that of Parit Suloh, following the 1st Defendant the driver of m/lorry JM 4870 when on reaching at the 25th milestone Johore Bahru/Air Hitam Road, the trailer of m/lorry JM 4870 disconnected from the m/lorry and collided into the Plaintiff's m/cycle and another m/lorry JJ 1058 travelling in the opposite direction.

4. The said collision was caused solely by the negligence of the 1st Defendant in the driving, management and/or control of m/lorry JM 4870; who was driving the said m/lorry as the servant or agent of the Second Defendant or in the matter in which the 2nd defendant was interested or concerned.

PARTICULARS OF NEGLIGENCE OF THE FIRST DEFENDANT.

a. Failing to keep any or any proper look-out;
b. Driving at an excessive speed in the circumstances;
c. Overloading the said m/lorry with iron-ore;
d. Failing to inspect the said m/lorry and the trailer of their roadworthy conditions;
e. Failing to observe or observe in time that the trailer of the said m/lorry had disconnected;
f. Failing to manage and/or control the said m/lorry to the trailer effectively;
g. Failing to secure properly and effectively the said trailer to the lorry; and/or
h. Failing to inspect or ensure whether the said trailer is effectively secured to the m/lorry.

5. By reason of the aforesaid negligence that Plaintiff has endured pain, suffered severe injuries and has been put to loss and expense."

In his evidence-in-chief Lau confirmed the account given in his police report. In particular he repeated that the trailer had snapped off before the collision between the trailer and the oncoming lorry.

It should be noted that in paragraph 3 of the Statement of Claim the respondent/plaintiff had alleged that the trailer of Ang's lorry had become disconnected and then collided with his motor cycle and the other lorry. In other words it had been the trailer and not the other lorry which had collided with him, a plea contrary to what he had narrated in his police report.

Ang, the first appellant, testified that the other lorry and his own came into collision and that the trailer got disconnected only after the accident. He denied that it was the trailer which had collided with the motor cycle or with the lorry.

The learned trial judge noted that no attempt whatsoever was made by Ang to explain how his lorry came into collision with the on-coming lorry nor how the trailer came to detach itself from his lorry. Cross-examined about the materially different account he had given in his police report he confessed that he really did not know what had happened between his trailer and the other lorry. Whilst admitting that he was responsible for fixing the trailer to his lorry he was unable to explain why or how the trailer broke free.

The main question in the court below and again before us is whether, since paragraph 3 of the Statement of Claim alleged that it was the trailer which collided with the plaintiff's motor cycle and since no evidence was given in court to support this allegation, the plaintiff/respondent can succeed in his claim. The learned trial judge examined the evidence carefully and reviewed a number of authorities, the more significant of which we propose to consider.

As the learned trial judge correctly observed the facts in *Anjalai Ammal & Anor.* v. *Abdul Kareem*[1] are far removed from those in the present appeal. What was in issue in *Anjalai Ammal's case* was whether one Khatijah had acquired an indefeasible title by adverse possession of some land as was alleged in the pleadings. Evidence was led at the trial to show, contrary to what was asserted in the pleadings, that one Ooi had gone into adverse possession as agent of Khatijah. This Court revised the finding of the trial judge, who had held on the evidence, that Khatijah had acquired an indefeasible title, on the ground that there had been a departure from the strict rules of procedure for deciding the case on an issue not raised in the pleadings.

Before us the appellant cited other authorities the most significant being *Esso Petroleum Co.*

Ltd. v. *Southport Corporation*[2]. There, an oil tanker was stranded in a river estuary and, to prevent her breaking her back, the master jettisioned 400 tons of her oil cargo which the tide carried to a foreshore, occasioning damage. The foreshore owners brought against the ship-owners an action based on trespass, nuisance and negligence alleging that the stranding was caused by faulty navigation; the defence denied negligence. At the hearing the shipowners' case was that the stranding was due to the tanker's stern frame being cracked so that the steering gear was faulty, but they called no evidence to show how this condition was caused. The trial judge held that they were not negligent as alleged in the statement of claim and that the foreshore owners were not entitled to succeed either in nuisance, trespass or negligence. The Court of Appeal held that the doctrine of *res ipsa loquitur* applied, and that the onus was on the shipowners to explain why the steering gear went wrong and that, as they had not done so, they were liable in negligence. On appeal to the House of Lords it was common ground that there would be a good defence in any event unless negligence was established.

Their Lordships held that since every allegation in the statement of claim was rightly decided by the trial judge in a sense adverse to the foreshore owners, who had made no allegation of unseaworthiness, the shipowners could not be held responsible because they did not negative a possible case which was not alleged against them in the pleadings *nor made against them in the course of the trial.*

Esso Petroleum was cited with approval by this Court in *Menah binti Sulong* v. *Lim Soo & Anor.*[3]

It has not escaped our notice that the circumstances in *Menah's* case are quite different from the present one. In both her statement of claim and repeatedly in evidence the appellant (Menah) stated that she alighted from a bicycle on which she was a passenger and was standing on the grass verge when the car, travelling on its wrong side of the road had knocked her down. The allegation had been denied by the respondent who averred that the bicycle had come out of a side road and across the path of the motor car. The trial judge did not consider her evidence reliable and found for the respondents, the only issue being whether the respondents were solely liable or not.

The appellant (Menah) then appealed against that very finding of fact. It was in these circumstances that Ong C.J. in delivering the judgment of the Court had said:

> "I think it is necessary in this case to emphasize once again that the Courts should give their decisions in strict accordance with the pleadings."

This Court distinguished *Menah's case* in the later decision of *Siti Aishah bte Ibrahim* v. *Goh Cheng Hwai*[4]. In *Siti Aishah's* case, the appellant pleaded in her statement of claim that she was walking on her proper side of the road, but in her evidence she said instead that she was crossing the road. This was in accord with her police report. In his defence the respondent said that she was indeed crossing the road.

The situation therein was therefore somewhat similar to that in the present appeal, for as was found in the judgment, the defendant was not misled, prejudiced or embarrassed or in any way taken by surprise. The *Esso Petroleum* decision, upon which the appellant relied so heavily was also distinguished. The House of Lords held there that

> "Every allegation in the statement of claim was rightly decided by the trial judge in a sense adverse to the foreshore owners, who had made no allegation of unseaworthiness, the shipowners could not be held responsible because they did not negative a possible case which was not alleged against them in the pleadings nor made against them in the course of the trial."

It was not without good reason this Court in *Siti Aishah* gave special emphasis to that part of the judgment of Earl Jowitt, as a thorough scrutiny of the main body of that judgment would reveal. Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise.

The same consideration was again the basis of the decision in *K.E.P. Mohamed Ali* v. *K.E.P. Mohamed Ismail*[5] where, although the statement of claim was statute-barred on April 11, 1974 there had been an acknowledgment of the debt in 1976. Although the acknowledgment was not pleaded in the statement of claim or the reply, this Court held that the case has been satisfactorily presented and developed in the proceedings before the High Court and that there was therefore sufficient evidence on record from which a decision to that effect could be arrived at.

In delivering judgment of this Court, Raja Azlan Shah C.J. (Malaya) (as he then was) said:–

"As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

This case was cited with approval in the recent Privy Council decision in *O.C.B.C. Limited* v. *Philip Wee Kee Puan @ Wee Kee Phuan*[6].

In yet another decision of this Court cited by Encik Subra Naicker, *Playing Cards (Malaysia) Sdn. Bhd.* v. *China Mutual Navigation Co. Ltd.*[7] 182, the pleading was likewise imprecise but each party knew the case presented by the other, it was held that justice required that the substantive issues between the parties should nevertheless be considered.

The learned trial judge made a lucid analysis, if we may say with respect, of certain English authorities which dealt with the scope of Order 18 rule 7, which is substantially similar to our Order 18 rule 7, commencing with *Waghorn* v. *George Wimpey & Co. Ltd.*[8] as authority for the proposition that where the evidence at the trial establishes facts different from that pleaded by the plaintiffs as constituting negligence which are not just a variation, modification or development of what has been alleged but which constitute a radical departure, the action will be dismissed.

This same test was again applied by Lord Guest *in John G. Stein & Co. Ltd.* v. *O'Hanlon*[9] who said:–

"The question is whether the case upon which the respondent succeeded was covered by the pleadings. I have no doubt that the respondent failed to establish the case of a longstanding over-hang some 30 feet from the corner. But in the way in which the evidence came out this became immaterial when the accident was proved to have taken place at about the corner .... Although this finding was to some extent a variation or modification of the respondent's case on record, it was based upon the same ground of fault and it related to the facts as found by the Lord Ordinary upon evidence properly before him. There was not, in my view, such a radical departure from the case averred on record as would justify the House in absolving the appellants from liability."

The Judge then went on to examine the salient features of the present appeal. He noted that the way in which the defence was conducted showed that the appellants were aware of the contents of the police report made by the plaintiff at an early stage, and that therefore it did not come as a surprise.

He considered (and we agree with him) that there was more to the Statement of Claim than just paragraph 3, and took into account the effect of paragraphs 4 and 5.

The legal result which the plaintiff was seeking to show from the facts pleaded therefore was that the 1st defendant/appellant had failed in his duty of care to the plaintiff, resulting in the injuries and damage suffered by him. He found, on the evidence adduced that all the particulars of negligence against Ang, the 1st appellant with regard to the trailer was on the balance of probabilities proven.

He gave due weight to what he regarded as the independent evidence of the sketch plan from which he drew inferences with which we cannot take exception. Since he found that the defence had advanced no explanation whatsoever as to why or how the collision had come about, he gave judgment for the plaintiff.

We agree with this finding and would dismiss this appeal with costs here and below.

Appeal dismissed.

Solicitors: *Dulip Singh & Co., Subra Naicker & Co.*

LOH WAI LIAN v. S.E.A. HOUSING CORPORATION SDN. BHD.

[F.C. (Wan Suleiman, Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) February 23 & June 28, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 266 of 1983]

Contract – Sale of land and house – Delay in completion – When cause of action accrued – Limitation – Limitation Ordinance, 1953, s. 6(1) – Housing Developers (Control and Licensing) Rules, 1970, r. 12.

Practice & Procedure – Action against housing developer for delay in completion of shophouse – When cause of action accrued – Limitation – Limitation Ordinance, 1953, s.16(1).